

UNITED STATES
COURT OF FEDERAL CLAIMS

SIERRA NEVADA CORPORATION,)	
)	
Plaintiff,)	
)	
v.)	Docket No.: 12-375C
)	
UNITED STATES,)	
)	
Defendant.)	

Live Tape

(The following transcript was transcribed from a digital recording provided by the United States Court of Federal Claims to Heritage Reporting Corporation on June 18, 2012.)

Pages: 1 through 39
Place: Washington, D.C.
Date: June 14, 2012

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IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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Thursday,
June 14, 2012

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BEFORE: HONORABLE CHRISTINE O.C. MILLER
Judge

APPEARANCES: (Via Telephone)

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1 is, but, you know, we do have a range of time. On the
2 other hand, since this is essentially a preproposal
3 matter, I want to handle it as fast as you want me to
4 handle it, but I have several observations.

5 The first is that Mr. McCullough's motion to
6 intervene took the position that Plaintiff should have
7 filed a notice of a directly related case, but
8 technically that's really not required since judgment
9 entered in No. 11-897C on May 11.

10 Technically, the notice of directly related
11 case is couched in the present tense, and that case no
12 longer exists. However, I am aware of the docket
13 sheet. Everything is under seal and except insofar as
14 in Mr. McCullough's motion and Plaintiff's complaint,
15 the references to those proceedings, I've not been
16 able to review them.

17 But certainly, if the parties had a strong
18 preference, since counsel are the same throughout
19 except Mr. Molar from the same law firm for Mr.
20 Maywart, if the parties had a strong preference, I
21 certainly wouldn't be offended to ask George Miller if
22 he wants this case or would take this case.

23 But, you know, unless there's a consensus,
24 I'm going to proceed. There's nothing wrong with
25 filing a new complaint, not filing a notice of

1 directly related case and getting a new judge. The
2 clerk's office informs us when there have been prior
3 proceedings, and as I said, other than a docket sheet,
4 I have no further intelligence about it.

5 So, to get to our agenda, we have
6 Plaintiff's motion for a protective order and a motion
7 for leave to file under seal, and the motion, the
8 clerk's office grants those motions as to the
9 complaint. The protective order Mr. Robinson, my law
10 clerk, just requested because it was not submitted on
11 ECF and I was wondering if Mr. Bennett had an
12 opportunity to review that proposed protective order,
13 which apparently included modifications to the
14 standard order.

15 MR. BENNETT: I have looked at it very
16 briefly, Your Honor. I received it a few minutes
17 before this status conference started, but given my
18 preliminary review, it looks very similar if not
19 identical to the protective order that was in place
20 during the prior protest in front of Judge George
21 Miller.

22 THE COURT: And that was an order that Mr.
23 McCullough agreed to?

24 MR. BENNETT: It was, Your Honor.

25 THE COURT: Okay. Then we'll go to the next

1 agenda item, which is Hawker's motion to intervene as
2 a matter of right, and I know that Hawker intervened
3 as a matter of right in the prior case. I know that
4 it's been represented that Defendant has no objection.

5 Mr. Miller, does Plaintiff have any
6 objection?

7 MR. MILLER: At this point, Your Honor,
8 we're not sure. We just received the motion this
9 morning. Frankly, we're not sure that given Hawker's
10 position in this case it actually has a sufficient
11 economic interest to allow for intervention either as
12 a matter of right or permissibly.

13 The caselaw that was cited in the motion
14 we're looking at right now but appears to be
15 distinguishable. So for the moment, Your Honor, we
16 don't agree to the motion. We will commit to respond
17 to it quickly so it can be resolved quickly.

18 THE COURT: Preliminarily, I'm of a view
19 that Hawker would have standing from the point of view
20 that we know there are only two offerors and we know
21 that it would be expected to be a proposer. And in
22 the past, that's been regarded as sufficient standing.

23 Vis-à-vis its standing relative to the prior
24 protest, I agree. It has no vested interest with
25 respect to the prior protest and the award at this

1 point. However, with respect to Amendment 10 to the
2 solicitation, it is going to be an offeror and we know
3 that, if nothing else, from its pleadings.

4 MR. MILLER: Your Honor, this is Mr. Miller
5 again. With those thoughts, which are very helpful,
6 in mind, I will confer with my client, but I suspect
7 we will be conceding the motion.

8 THE COURT: Right. And I will allow you to
9 proceed on that basis. Now, for purposes of
10 scheduling though, I will allow Mr. McCullough to
11 participate. I'm not going to enter the protective
12 order with respect to anybody else other than existing
13 parties. But when I enter the ruling, I will enter an
14 order for expedited briefing on the motion to
15 intervene at the conclusion of today's conference.

16 Okay. Now this is a billion dollar
17 contract, so I was rather surprised to see Plaintiff
18 invoking the Equal Access to Justice Act. I was just
19 curious whether Plaintiff is eligible.

20 MR. MILLER: Your Honor, that was a part of
21 the complaint that someone else worked on. Let me
22 revisit that. I'm not prepared to respond to that,
23 but I will look at that promptly today as well.

24 THE COURT: The reason that's important, my
25 reaction would be, no, you aren't, but, you know,

1 assuming you were, I always want to give the
2 government an indication as we proceed what the
3 Court's thinking is about the merits of the complaint,
4 and I'm not going to speak ex cathedra if in fact that
5 was an inappropriate allegation.

6 MR. MILLER: We will look at that this
7 morning, Your Honor, and correct that if we need to.

8 THE COURT: Okay. The motion for protective
9 order I'm going to grant as to the two parties.
10 They're now in there. Okay.

11 What is the proposal submission date under
12 this last amendment, which I gather is Amendment 10?

13 MR. BENNETT: I believe it's at some point
14 next week, Your Honor, but I'm not entirely positive.

15 MR. MILLER: It is, Your Honor. It's
16 Monday, June 18. Part of the submissions have been
17 made. The past performance components I believe were
18 due on the 4th, but the final part of the proposals
19 are due on Monday, the 18th.

20 THE COURT: And you haven't asked for any
21 injunctive relief, so we're just going to schedule
22 this how we schedule it.

23 MR. MILLER: That's correct, Your Honor.

24 THE COURT: Okay. Well, they certainly
25 asked for proposals in time to do some testing if

1 testing there may be. I mean, there's a substantial
2 hiatus between January 2013 and June 18, but be that
3 as it may, let me tell you what I think we're dealing
4 with here and what we're not dealing with here.

5 The Air Force has the ability to issue a
6 corrective order of its own, as a product of its own
7 best judgment, and it has a lot of discretion in doing
8 so. It is not required to reinstate Plaintiff's award
9 if the corrective order is improvidently sought out.
10 I mean, that's just not the basis of a challenge.

11 If there isn't a facial basis to the action
12 taken under the corrective order that can be alleged
13 to be arbitrary or capricious, it may proceed. And so
14 Plaintiff has no vested interest in its award against
15 which the corrective order operates.

16 The corrective order, however, cannot be
17 pretextual. It cannot be designed in the form of a
18 resolicitation that works around any of the
19 deficiencies that previously rendered Hawker
20 noncompetitive. And I'm assuming there was no prior
21 discussion with respect to the financing issue. None
22 has been mentioned, but the prohibition on the
23 financing has been eliminated. And with respect to
24 the testing, I infer from the complaint and the
25 attachments that unquestionably the Air Force found

1 Hawker to be deficient in the testing and eliminated
2 the entire requirement, Part L.

3 But by virtue of Hawker's protest -- I
4 haven't read it, but I have read Hawker's allegations
5 about it in its memo of P&A in support of its motion
6 to intervene. I gather that Hawker is saying either
7 that the testing was done deficiently and that
8 actually it should have passed and/or that Plaintiff
9 had performance deficiencies that should have been
10 revealed in the testing and it didn't qualify.

11 Now this becomes important because what
12 we're dealing with here is an action that challenges
13 the corrective action. If the action challenges the
14 corrective action, the reasons why the corrective
15 actions were taken and all of the documentation
16 relating thereto become if you will the decisional
17 documents that we're going to be looking at.

18 And those decisional documents, if in fact
19 they led to whatever the current iteration of the
20 solicitation is in 10 -- I haven't read it, it wasn't
21 submitted -- if they discussed the elimination of the
22 testing requirement, that's obviously very pertinent.

23 For example, let's say the scenario went as
24 follows. We -- I'm hypothesizing the Air Force -- we,
25 the Air Force, reviewed all the testing and we found

1 that it actually was carried out defectively and
2 Plaintiff was deficient and maybe Hawker was or
3 wasn't, but it was so defective that we just want to
4 be done with it. We don't need this requirement and
5 the reason we don't need it is as follows, and then
6 there's a reason. There would seem to have to be a
7 reason if Plaintiff is correct, as alleged, that the
8 operational requirements are the same.

9 If in fact the record does not support that
10 kind of approach, it would appear that the
11 solicitation was designed around perceived
12 deficiencies in Hawker's proposal. That's the worst-
13 case scenario from Hawker's point of view. And the
14 antidote to that or the retort to that is the record
15 or analysis that supports the corrective action,
16 whatever that is.

17 Again, I emphasize two things: one, that
18 the reason for the corrective action eliminating that
19 requirement can't be pretextual. It can't be designed
20 around a way to eliminate a problem that Hawker faced
21 and Plaintiff didn't face, and that would apply of
22 course to the financing requirement.

23 And the reasons for the changes in the
24 solicitation as part of the corrective action would be
25 expected to be found in the administrative record,

1 which doesn't consist of the earlier procurement. It
2 consists of all of the documentation surrounding the
3 resolicitation. I mean the decision to go ahead, a
4 corrective action by the resolicitation.

5 Plaintiff might argue that the actual
6 testing results earlier are material because the
7 analysis of them would be contradictory to or not
8 illuminated by the administrative record that reveals
9 what was done around the corrective action, in which
10 case that part of the earlier record would be
11 transported into this record. And I assume there
12 would be a motion in that regard if after Plaintiff
13 examines it the file is incomplete regarding the
14 corrective action or not self-explanatory, not fully
15 explanatory or otherwise raises questions.

16 But right now the way this procurement is
17 postured, Plaintiff's strong argument is not the
18 argument that a corrective action must be fashioned
19 that gives Plaintiff the fullest opportunity to
20 compete in its area of strength, which apparently are
21 these demonstration test results. You know, you can
22 argue it. You can try to brief it. Good luck. I
23 don't think there's anything out there that will
24 support it.

25 Plaintiff has a very strong argument that to

1 the extent that the resolicitation is designed around
2 previously identified deficiencies, whether recognized
3 or not, and the were not includes the financial one
4 that would have rendered Hawker noncompetitive, it
5 would be declared arbitrary and capricious under the
6 Blue & Gold standard. That's a very strong argument.

7 In that regard, Exhibit A is going to be in
8 the administrative record, the CDI report. Why? We
9 don't need a motion for it. It's going to be in
10 there, and, Defendant, when it files the
11 administrative record, make sure that it's in there.
12 And that is because it preceded the draft Amendment
13 No. 0008. It was apparently finalized on April 13,
14 and the first draft amendment was April 17, and the
15 final version, which we have as Plaintiff's Exhibit E,
16 was May 4. Then there are two other amendments that
17 were alluded to. I don't have those.

18 MR. BENNETT: Your Honor, if I could
19 interject for a moment. It's Hunter Bennett for the
20 Department of Justice.

21 My understanding from talking to the agency
22 is that the people that drafted the amendment to the
23 RFP weren't shown the CDI. They were purposely kept
24 apart from that so that they wouldn't be influenced by
25 the various problems that had come before.

1 THE COURT: That's all well and good, but
2 it's also self-serving. You'll need affidavits or
3 declarations. I want that report in.

4 MR. BENNETT: Okay. Well, we'd be happy to
5 provide the affidavits and the declaration. We would
6 appreciate the opportunity to brief the issue before
7 the CDI is ruled to be a necessary part of the
8 administrative record.

9 THE COURT: This matter was made public to
10 -- and by public, I mean published. It was published
11 to a House committee on the 13th, delivered to
12 individuals in the Congress. Whether or not your
13 individuals were kept pure from knowledge of that,
14 that knowledge was in the possession of members of
15 Congress and their associates and assistants and those
16 people who deal with concerned constituents such as
17 corporations. And if anybody had access to that
18 information, I want to see it.

19 MR. BENNETT: Well, Your Honor, I know for
20 sure that Congress was given a debriefing, and I think
21 that some, if not all, of that debriefing was made
22 available to the public. I'm not entirely sure that
23 Congress was actually given a copy of the CDI report.

24 THE COURT: Right. Well, then you're going
25 to be informing me of that. I mean, you know, I don't

1 know either, but I do know the timing, and if Congress
2 was given a debriefing, you are going to inform me
3 what Air Force officials, if any, were privy to this.

4 MR. BENNETT: Okay.

5 THE COURT: I want to know. Whether or not
6 there were efforts to keep the individuals who were
7 drafting a resolicitation away from that particular
8 document is not as material as who did know about it.
9 This is an operative document. It's called
10 institutional knowledge, and it's attributable, giving
11 due regard to efforts to erect Chinese walls.

12 MR. BENNETT: Okay. Again, Your Honor,
13 these are all good questions. I will find out the
14 answers to them, and as soon as I have them, we will
15 give Your Honor a filing that answers these questions.

16 THE COURT: Your filing will be in support
17 of your position that this should be excluded from the
18 administrative record or excluded from the record of
19 the Court proceeding.

20 Remember, there are two levels of relevance
21 here. One is documents that were in existence and
22 relied on by the decisionmakers, which includes the
23 entire Department of Air Force, and two is whether the
24 existence of the document and its having been
25 published, and by that, I mean uttered aloud,

1 reported, disclosed to others who have access to
2 outside sources, is relevant to Plaintiff's bid
3 protest. So the fact that it might not be submitted
4 as part of the administrative record does not mean
5 that it doesn't have to be turned over. So try to
6 deal with it on both grounds so we can move the matter
7 forward as to that.

8 If Plaintiff would rather take the laboring
9 oar as you did in front of Judge Miller and move for
10 its disclosure, that's fine with me. I mean, it's
11 Plaintiff's choice, not Defendant's here. So, if
12 Plaintiff wants Defendant to take the laboring oar and
13 respond, that's one thing. Or if Plaintiff wants to
14 go ahead on its own, that's up to Plaintiff.

15 Mr. Miller?

16 MR. MILLER: Your Honor, we will be happy to
17 file an affirmative motion. We agree with the Court
18 that we think it is a part of the administrative
19 record, but even if not, we believe it is relevant.
20 But we'll be happy to file something that outlines our
21 views on those questions.

22 THE COURT: Okay. Now that brings up matter
23 two, and again, this doesn't involve Mr. McCullough
24 until or unless, you know, Hawker becomes a party,
25 which I think it will, and that is it's up to the

1 parties to what extent they want me to look at any or
2 all of the matters in the previous sealed procurement.
3 It's absolutely up to you.

4 If, for example, Mr. McCullough files a
5 brief that shows that the earlier protest raised
6 testing deficiencies of a certain nature that infected
7 the entire testing process and thereby should have
8 been reflected in Plaintiff's results as well as
9 Hawker's, that's the kind of thing that that's a
10 perfectly appropriate appendix, but, you know, it's
11 under seal, so, you know, you do what you have to do.
12 But whether and to what extent you want to rely on
13 those documents is at the discretion of the parties.
14 I'm not taking the position that I have to see them or
15 don't. It's totally up to you. This is your case,
16 not mine. I mean, it's mine to decide but not mine to
17 craft.

18 I think then that we would be proceeding in
19 the normal course with the filing of the
20 administrative record, and we'll have our briefing on
21 the CDI results. We're going to previously have
22 expedited briefing on the motion to intervene. The
23 protective order will be entered as to two of the
24 parties. If the motion to intervene is granted, I
25 will extend the protective order to Hawker. So are

1 the parties in a position where they would like to
2 propose a briefing schedule, understanding that any
3 dates operative for Defendant would also be operative
4 for the putative Intervenor? Do you want to do that
5 now?

6 MR. BENNETT: Your Honor, we would prefer
7 not to set a briefing schedule now, particularly in
8 light of the fact that we're going to be having
9 motions for actions concerning the CDI issue. I think
10 once that's resolved, at that point, we would be ready
11 to set a briefing schedule.

12 THE COURT: Mr. Miller, what are your views?

13 MR. MILLER: Well, first of all, Your Honor,
14 I believe it would be helpful and I will commit to do
15 this to confer with both Mr. Bennett and Hawker's
16 counsel about the scope of the administrative record.

17 I did speak with Mr. Bennett tentatively
18 yesterday, and at least tentatively, we seem to both
19 agree that the entire previous record should just be
20 included with this so that we don't get into questions
21 about violating the protective order in that case.

22 If that's still the case, that seems like it
23 will speed things up and we will have the
24 administrative record sooner than later. And if so, I
25 guess I would like to have a briefing schedule set.

1 Maybe we can't do it today, but I guess I wouldn't
2 want to have to wait until the full CDI issue is fully
3 resolved to have a schedule in place.

4 THE COURT: I agree. What I will do is the
5 administrative record may be augmented by the CDI
6 report or the CDI report may be used by anybody in
7 litigation, which is a different issue because
8 Defendant takes the position this was not part of the
9 administrative record and it was not relied on in the
10 decisionmaking process that led to the original
11 proposed amendment and any of its subsequent versions,
12 but that doesn't mean that it isn't relevant to the
13 action. You know, we could do an awful lot if you
14 wanted to by having in-camera inspection, but I'll be
15 very happy to address this in any matter that all
16 counsel agree.

17 I do think we should have a date for filing
18 the administrative record. So I'm going to be giving
19 you today an expedited briefing schedule for
20 Plaintiff's motion to supplement the record -- or
21 motion to include -- it's not supplementing the
22 record. It's a motion to designate the report as part
23 of the administrative record. And we'll have
24 expedited briefing on that. We'll have expedited
25 briefing on the motion to intervene.

1 I'm not going to stay awake at night about
2 the EAJA issue. That is again something that it
3 doesn't render the pleading defective. It would just
4 be irrelevant. You either qualify or you don't
5 qualify, but that's a dialogue I like to keep going if
6 it is in play because it's very important for the
7 government to understand at every given point where
8 Plaintiff's case has to be litigated and where it
9 doesn't.

10 Right now, when could you file the
11 administrative record? And I gather counsel of the
12 available parties agree that it should include the
13 prior filings in No. 11-897C. When do you want to
14 file that?

15 MR. BENNETT: Well, there are a couple
16 things that are worth noting, Your Honor. The first
17 is that the administrative record in the prior protest
18 was 120,000 pages long.

19 That being said, one of the reasons, and
20 this will sort of be fleshed out more as we go
21 forward, one of the primary reasons behind the Air
22 Force's decision to take corrective action was that we
23 discovered on the day that Hawker filed its MJAR in
24 that case that the administrative record was
25 substantially incomplete. And then in the process of

1 the agency gathering or attempting to gather up the
2 documents to make the record complete, they discovered
3 that it was even more incomplete than they actually
4 had initially thought, and most troublingly, they were
5 unable to ascertain a date by which they would be able
6 to make the administrative record.

7 THE COURT: So it was not filed?

8 MR. BENNETT: The short answer, Your Honor,
9 is that even though they had filed 120,000 pages of
10 documents, they discovered that there were a lot more
11 documents out there that they did not have a handle
12 on.

13 THE COURT: Okay, I'm sorry. I thought you
14 were talking about making available to me the record
15 in the prior proceeding.

16 MR. BENNETT: Yes. We were going to make --

17 THE COURT: The litigation record is what I
18 was talking about.

19 MR. BENNETT: Oh, the litigation record as
20 opposed to the administrative record?

21 THE COURT: Well, yes. I thought that's
22 what you were talking about. That's what was under
23 seal.

24 MR. BENNETT: Yes. We would --

25 THE COURT: I mean, do you both agree that

1 that would be helpful?

2 MR. BENNETT: Yes. It would be helpful for
3 Your Honor to have at your disposal.

4 THE COURT: That's what I referred to it as
5 the record in the prior case.

6 MR. BENNETT: Yes, but as I just
7 mentioned --

8 THE COURT: Now had you filed a
9 substantially incomplete administrative record of
10 120,000 pages?

11 MR. BENNETT: Yes, that's correct, Your
12 Honor.

13 THE COURT: You had? You had or had not?

14 MR. BENNETT: We had.

15 THE COURT: Okay. Now this is important.
16 I'm not going to allow to be filed in this case a
17 120,000-page record. The action in the prior case and
18 the corrective action taken thereon was on the basis
19 of the record as it then existed, and the record as it
20 then existed was 120 pages long, plus the recognition
21 that it was substantially incomplete.

22 We read administrative records. The only
23 relevance of this pagination is -- and all parties
24 have access to it, and Mr. McCullough will be able to
25 state his preference if and when he's admitted. But

1 as far as I'm concerned, what you're going to file is
2 going to represent a consensus between you and Mr.
3 Miller as to which of those pages pertain to testing
4 and finance.

5 MR. BENNETT: Okay.

6 THE COURT: And I don't want to see the rest
7 of it. It's not relevant to anything in this case
8 unless Mr. Miller can tell me why it is.

9 MR. MILLER: Okay, Your Honor. Thank you.

10 MR. BENNETT: With respect to the --

11 THE COURT: It's your responsibility as
12 counsel to purge this down to those issues.

13 MR. BENNETT: Okay, Your Honor. And in
14 light of what Your Honor said about what you
15 envisioned the administrative record should be going
16 forward, we believe that the agency would be able to
17 get those documents gathered up and have them ready.

18 You know, last time I think part of the
19 problem, we may have erred on setting an overly
20 ambitious time to get the record in. I think this
21 time, if we had three weeks, that would be ideal, and
22 we would do our best to get the administrative record
23 filed in less time than that.

24 THE COURT: Well, I can't imagine in a case
25 like this where all you have is documentation that led

1 to the draft amendment and the cancellation in a
2 month's period, you know, roughly from April 17 to May
3 and any period before that when you're dealing with --
4 anything dealing with cancellation, that, you know,
5 we're certainly not approaching a significant record.
6 I mean, this has nothing to do with submissions by the
7 parties.

8 What I'm suggesting is this. I've never
9 waited three weeks for an administrative record. I
10 mean, a bid protest to me is a bid protest. It's a
11 matter that deserves expeditious treatment. We try to
12 interfere at the very least with the procurement
13 process and the time period is relevant to that goal.

14 I have no problem with your submitting this
15 incrementally. As a matter of fact, it would help our
16 review of it. The administrative record could be
17 viewed as two parts, the administrative record that
18 deals with the Court proceedings in 11-897 -- I'm
19 sorry. That's a record that you agree I should look
20 at in connection with this proceeding. I'm not
21 calling it administrative record, but you are going to
22 agree that I'll put in the order that it'll be
23 considered a part of this proceeding, okay?

24 MR. MILLER: Okay.

25 THE COURT: A part of this record, okay, so

1 you don't need to file anything.

2 MR. BENNETT: We just need to designate what
3 portions of it are relevant?

4 MR. MILLER: And may I ask for some
5 clarification, Your Honor? With that incorporation of
6 the prior record, does that include the administrative
7 record, meaning that with the new protective order?

8 THE COURT: No. No.

9 MR. MILLER: Okay. So the question I have
10 is --

11 THE COURT: Nobody acted on that. The only
12 thing that ever happened was a brief was filed. To
13 the extent that there are page references to the
14 administrative record in the one brief that was filed
15 by Hawker, assuming that they weren't replicated in an
16 appendix, they're going to be part of this record,
17 okay. So no. It's going to be limited to anything
18 dealing with the testing --

19 MR. MILLER: That I understand, Your Honor,
20 and we will abide by that. I'm probably being overly
21 concerned about the technical issue, but because the
22 prior record is subject to a protective order, I just
23 want to be careful that if we use this, that the prior
24 record in terms of winnowing it down, we're not
25 violating that prior protective order.

1 THE COURT: Well, I mean, Mr. Miller wasn't
2 admitted. It was the prior counsel, and I don't
3 understand how it would.

4 MR. MILLER: But I was granted access to the
5 administrative record in that case, Your Honor. We're
6 just concerned. We want to be careful about referring
7 back to that administrative record and being in
8 violation of that protective order.

9 I guess given the Court's instruction for us
10 to winnow that administrative record down, I'm
11 understanding that that prior administrative record is
12 subject to the current, the new protective order and
13 what we need to do is thin it out so that this Court
14 doesn't get burdened with 120,000 pages.

15 THE COURT: Well, that was the hope.

16 MR. MILLER: And that will be my plan. I
17 just didn't want to get crosswise with the earlier
18 protective order in having to dig back into that
19 administrative record in the context of this case, but
20 it sounds like we're all clear on that.

21 I guess the other question I have, and maybe
22 this is directed to Mr. Bennett, is what will be the
23 procedure in terms of our ability to participate in
24 winnowing down the previously undisclosed component of
25 the record? Will we get a chance to see all of that,

1 Hunter, and then have a chance to weigh in on how much
2 of that should --

3 THE COURT: No. No, no, no. That case was
4 over. That case was over with a portion of the record
5 on file. The portion of the record on file was the
6 portion of the record that -- well, maybe I spoke too
7 soon. Maybe I misinterpreted Mr. Bennett's remarks.
8 I thought you said that all the documents that were
9 found were found but that there was a recognition that
10 the record was substantially incomplete. I inferred
11 from that remark that you filed everything that you
12 had, but you knew you need to get more. If you're
13 saying you filed everything that you had, but you were
14 holding a bunch of more records that you were going to
15 supplement except that you took corrective action and
16 you held them back knowing they too didn't complete
17 the record, that's a different issue.

18 MR. BENNETT: Well, Your Honor, the way that
19 it worked really was we filed the 120,000 pages that
20 we thought represented the entire administrative
21 record. We discovered that that was not the case.
22 There are many, many other documents out there that
23 the Air Force has not gathered because the Air Force
24 elected to take corrective action.

25 Our position would be --

1 THE COURT: Okay. I mean, that's what I
2 just said. If you didn't elect to gather them, they
3 don't exist for purposes of this case.

4 MR. BENNETT: Okay. I understand. Your
5 Honor, Mr. Miller does raise an interesting point,
6 though, about this problem with the prior protective
7 order.

8 THE COURT: Look, you can do what you want
9 with the prior protective order. I have nothing to do
10 with it. This is a dead case, and all you need to do
11 is go in and have a joint motion that the seal be
12 lifted to allow you to file the materials under seal
13 in this case and to lift the protective order insofar
14 as any orders emanate in this case. That's all you
15 have to do.

16 MR. BENNETT: Okay.

17 THE COURT: You've covered yourselves
18 legally if you do that. You know, that's something
19 you do. It is something you might want to give me a
20 courtesy copy of, but that's between you and Judge
21 Miller and the records people.

22 MR. BENNETT: Okay.

23 THE COURT: In other words, you get to read
24 the rules about how you deal with material that is
25 under protective order as well as sealed -- that's

1 being redundant -- the Court record insofar as it's
2 under seal and/or protected, okay? But I'm going to
3 enter an order that assumes that you're going to take
4 the steps necessary to make these materials available.
5 Right now I couldn't get them if I wanted to.

6 And when I talk about the Court record, as
7 far as I'm concerned, I'm interested in the complaint.
8 I'm interested in the motion to intervene, you know,
9 and I'm interested principally in Hawker's brief and
10 any attachments and anything related to that. That's
11 it. That was at the end of that record. I mean, I'm
12 reading the docket sheet, but there's nothing else
13 substantive.

14 MR. MILLER: I believe that's correct, Your
15 Honor, because the notice of corrective action was
16 filed before Sierra Nevada had an opportunity to
17 Respondent to Hawker's brief.

18 THE COURT: That's right. So what I'm going
19 to do is indicate that I will expect that Plaintiff
20 and Defendant will undertake to lift the seal as to
21 the documents that were part of the earlier Court
22 action and because, you know, just by judicial notice
23 I can refer to them, but just so everybody is
24 operating on the same page, I'm going to have you
25 refile them in this case. And they're not part of any

1 administrative record. They're a background document
2 that's relevant to the facts and so that I know I'm
3 looking at the unsealed copy, okay? And then I'm
4 going to have you file an administrative record that
5 consists of those documents that relate to the issue
6 of testing and financing. I don't think there's
7 anything else that would be appropriate.

8 Now there is one possibility, and again, I
9 don't know what the allegations of the earlier motion
10 were, but if Mr. McCullough took the position that
11 Plaintiff was deficient in other than essentially the
12 testing, those documents, you know, might make their
13 way into the administrative record in this case.

14 But I gathered that, Mr. McCullough, was the
15 gist of your complaint that there were deficiencies
16 with respect to SNC's testing?

17 MR. MCCULLOUGH: Your Honor, in the motion
18 for judgment on the administrative record, there are
19 significant issues raised and documented with regard
20 to Sierra Nevada's offering.

21 THE COURT: Okay. And when you say raised
22 and documented, were they appendices to your motion?

23 MR. MCCULLOUGH: No. We had an electronic
24 record, Your Honor, and I don't recall whether we
25 actually produced paper copies of the referenced

1 documents, but they were all footnoted to the
2 appendices in the administrative record.

3 THE COURT: Well, I have a standard order
4 that requires a courtesy hard copy of everything, so
5 be aware of that.

6 MR. MCCULLOUGH: Yes, Your Honor.

7 THE COURT: Once again I am killing the
8 forest, but you can rest assured we'll read it. We're
9 not reading 120,000 pages, and Plaintiff didn't
10 cite -- I mean, Plaintiff in that case, Hawker, didn't
11 cite 120,000 pages. But at any rate, be that as it
12 may, I'd like those pleadings to be filed as part of
13 the record in this case and they can be filed along
14 with a notice of filing, and that means you're going
15 to give me a hard copy, so every party is responsible
16 for filing the documents that it filed before.

17 Hawker has a complaint. Plaintiff has a
18 motion to intervene. Hawker has a motion for judgment
19 on administrative record. I don't think there's
20 anything else we need to look at.

21 The briefing material to the CDI report, you
22 know, I can't imagine that would be relevant at all
23 because, you know, that investigation postdated the
24 earlier evaluation, but that's up to the parties, so
25 I'll put that in the notice too.

1 And then what you're going to file as the
2 initial administrative record, it would be those
3 documents that related to at least the testing and
4 financing. If there were documents related to other
5 aspects of deficiencies, it really doesn't matter.
6 We're not revisiting the prior protest. This is this
7 protest, and this protest has to do with the issue
8 that I indicated, that the strong allegation here is
9 that the resolicitation was designed in a way to favor
10 Hawker, meaning no testing requirements at all because
11 Hawker had failed. I mean, you know, the earlier
12 lawsuit wasn't adjudicated, and this financing issue.
13 So that's what I'll be looking at.

14 And as I said, to give you an idea, this is
15 the case you paint that Plaintiff in this case loses,
16 that the administrative record shows that there was
17 such a concern about the testing that it was
18 determined that both parties had been disadvantaged by
19 it in the sense that there had not been meaningful or
20 reliable testing or that the testing protocols
21 themselves were deficient and it didn't matter how
22 they were applied, they were just deficient and that
23 this testing actually served no reasonable purpose at
24 all and shouldn't have been part of the earlier
25 proceeding and the basis on which the operational

1 assessments can be determined reasonably without any
2 testing.

3 Now that's the kind of neutral evaluation
4 that would suggest that you've got a really good
5 reason for doing what you did, and I'm only talking
6 about testing. What wouldn't work would be either
7 nothing in the file or something that said we got rid
8 of the testing because it was a real problem. And we
9 know we're going to have Hawker and SNC fighting over
10 this contract until it's irreversibly awarded.

11 But I can't predict any other protest that
12 could be filed based on the result of this. You could
13 have a situation where if you didn't have a
14 nonarbitrary corrective action vis-à-vis the
15 elimination of these two requirements, you'd have a
16 situation where the Court could make all the
17 declarations there are, but I cannot be in a position
18 to command the Air Force to go ahead with a prior
19 contract. I can only prohibit them from proceeding
20 with Hawker, okay?

21 The Air Force always can say the following:
22 gee, we don't want to spend a billion dollars
23 assisting Afghanistan. Gee, this isn't worth going
24 through. Gee, we'll do it another way. You know,
25 Plaintiff has to understand the limits of what I can

1 and cannot do, but that's what we'll be trying to do,
2 and I hope that you'll all agree when the time comes
3 to a briefing schedule that suits all of your
4 interests. My main concern now is to get on file what
5 we can to get access to the previous pleadings of note
6 and to resolve who the parties will be and to resolve
7 the status of the CDI memo.

8 MR. MILLER: Your Honor, this is Mr. Miller.
9 What I will do is I will confer with Mr. Bennett and I
10 will hope by this afternoon or early tomorrow we will
11 know our position on the intervention, and we'll have
12 that resolved so that if we're not going to oppose the
13 intervention Hawker can participate. And then what I
14 would propose is that the three parties confer either
15 tomorrow or the beginning of next week about all of
16 these issues and sketch out a game plan among us going
17 forward as well.

18 THE COURT: So you don't want me to enter an
19 order today other than granting the protective order
20 and the filing the case under seal? You're asking me
21 to hold on?

22 MR. MILLER: Well, no. We don't mind having
23 the expedited briefing orders in there as well.

24 THE COURT: Okay. That's fine. That's
25 great. You can always contact Mr. Robinson

1 telephonically if you decide, look, we don't really
2 need further briefing, we all agree on the following
3 and so forth. That's just fine. We do not email the
4 law clerk. He's available by phone.

5 What's your extension?

6 MR. MCCULLOUGH: Your Honor?

7 THE COURT: 357-6622.

8 Go ahead.

9 MR. MCCULLOUGH: I'm sorry, Your Honor.
10 This is Mr. McCullough. From the putative
11 intervenor's point of view --

12 THE COURT: Putative, but go ahead.

13 MR. MCCULLOUGH: Sorry. We need to see the
14 complaint to be able to respond if in fact they're
15 going to oppose Hawker's intervention, and I wonder if
16 you could contemplate how we can do that either under
17 the protective order that you are going to issue or
18 some other way.

19 MR. MILLER: And if I may interrupt, Your
20 Honor, this is Mr. Miller. I suspect where this is
21 headed is we are not going to oppose the motion to
22 intervene, and so that will resolve that problem. It
23 may be helpful to see if I can get an answer to that
24 question and maybe eliminate the question that Mr.
25 McCullough just raised.

1 THE COURT: Yes, I think that if you don't
2 agree, you're inviting a level of complexity that we
3 really don't need to get into. It's just going to be
4 a side-show.

5 MR. MILLER: I understand, Your Honor. I
6 appreciate the guidance.

7 THE COURT: And also as an officer of the
8 Court, I can disclose to Mr. McCullough enough about
9 the complaint that he could respond to, meaning I'll
10 sit here and read it to him. But that's fine.

11 What I'm just going to do then is enter an
12 order with a briefing schedule, which may be obviated
13 very soon, and a date to file the administrative
14 record. You know, it can be supplemented as you find
15 more pages, but the one that's purged -- I mean, we
16 have two administrative records in our mind. One is
17 the purged that was filed in the last matter, and then
18 the other is assembling and filing the record that
19 surrounded the corrective action, and I just don't see
20 three weeks.

21 I can see three weeks for agreeing on the
22 documents out of the 120,000 that might be marginally
23 relevant, but this is going to be a continuing process
24 and I want it done as soon as possible. And right now
25 I'm going to list two weeks, and that's for

1 everything, and then somebody can give me a reason why
2 it should be extended. Okay? And I don't mind
3 tomorrow issuing another order immediately granting
4 the motion to intervene as a matter of right as
5 unopposed and allowing Mr. McCullough to be subject to
6 the protective order.

7 MR. MILLER: And we will alert Mr. Robinson
8 to our position, but I suspect that's where we'll be,
9 Your Honor.

10 THE COURT: Okay. And if you could do so by
11 as a matter of personal convenience 2 p.m. tomorrow.

12 MR. MILLER: We'll even try to do it today,
13 but certainly by 2 p.m. tomorrow, Your Honor, yes.

14 THE COURT: Oh, okay. Thank you.

15 Is there anything else we can do today?

16 (No response.)

17 THE COURT: Well, then not hearing anything,
18 thank you very much for participating, and Mr.
19 Robinson will wait to hear from you and sort out what
20 we need to look at, and we'll be going forward.

21 Let me know through Mr. Robinson any time I
22 can have an on or off the record -- preferred on the
23 record -- status conference that would convenience you
24 rather than coming into Court or filing papers.
25 Everything will be subject to recordation as well as

1 an order that's entered at the end, but if you want to
2 proceed formally, that's your option. Okay?

3 MR. MILLER: Thank you, Your Honor.

4 THE COURT: Thank you.

5 MR. BENNETT: Thank you, Your Honor.

6 THE COURT: Bye.

7 (Whereupon, at 1:56 p.m., the status
8 conference in the above-entitled matter was
9 concluded.)

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CERTIFICATE

DOCKET NO.: 12-375C
CASE TITLE: Sierra Nevada Corporation v. U.S.
HEARING DATE: June 14, 2012

I certify that the foregoing is a true and correct transcript made to the best of our ability from a copy of the official electronic digital recording provided by the United States Court of Federal Claims in the above-entitled matter.

Date: June 20, 2012

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